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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1942.

No.

SERIES "A" TRUST, AN EXPRESS TRUST, *Petitioner*,
v.
GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

This is a petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia involving a decision by that Court in the case of *Series "A" Trust, An Express Trust*, v. *Helvering, et al.*, No. 7868, wherein that Court affirmed a decision of the United States Board of Tax Appeals.

OPINIONS BELOW.

The opinion of the Court of Appeals (R. 78–81) is reported at — — App. D. C., — —, 126 F. (2d) 530, and the opinion of the Board of Tax Appeals (R. 28–35) is unreported.

JURISDICTION.

The opinion of the Court of Appeals was entered March 9, 1942 (R. 78), and the judgment of the Court was entered on the same day (R. 81). On March 24, 1942, petitioner filed a

timely petition for rehearing and modification of opinion and judgment (R. 82–84), which was denied by the Court on April 16, 1942 (R. 84). This petition is made pursuant to Section 240 (a) of the Judical Code (36 Stat. 1157, Sec. 240 (a)), as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U.S.C.A. Sec. 347), and within the three months period from the date of entry of final judgment in the lower court as provided by Section 8 of the Act of February 13, 1925, c. 229 (43 Stat. 940, 28 U. S.C.A. Sec. 350).

STATUTES INVOLVED.

The relevant statutes are set out in the appendix to this petition (pp. 7–8).

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The questions involved in this case are related to those in *Second Carey Trust* v. *Helvering*, and *Hare Trust* v. *Helvering*, now pending before this Court on petitions for certiorari at Nos. 135 and 136, respectively. The case involves petitioner's income and excess-profits tax liability for 1933 and 1934.

On June 10, 1933, the Southwest Company (an express trust) executed a Declaration of Trust creating Series A Trust, (R. 57–64) in which it declared itself trustee of a 40% interest in the working interest of the "Sinopoulo" oil and gas lease and of a $25,000.00 oil payment to be paid out of 9–1/6% of the oil produced from the "Turner" oil well. Both the Sinopoulo lease and the Turner well were in Oklahoma City, Okla. (R. 29, 57). The trustee also conveyed to petitioner its interest in a lease on two quarter sections of land in Oklahoma. This was a wildcat lease which expired through non-payment of rental. Neither petitioner nor its trustee paid any rent on the lease. (R. 29, 50, 57.)

The trust instrument provided for the division of the beneficial interest in petitioner's property into 2800 units, and all of the 2800 units were sold to the public (R. 51, 58).

There was one producing well on the Sinopoulo lease in 1933 and 1934. No additional wells were drilled thereon. The well was operated by Jacobs Oil Company and petitioner had no voice in the operation or management of the property. Its only function was to receive its share of the money from sales of oil and gas and distribute it to its beneficiaries. (R. 50–51.)

Petitioner received the $25,000.00 oil payment in full from the proceeds of the Turner well in 1933 and 1934 and distributed it to its unit holders. That exhausted petitioner's interest in the well. Petitioner did not operate the Turner well in 1933 or 1934. (R. 50, 54.)

The provisions of the trust instrument creating petitioner, and the powers of the trustees thereunder, are similar to those in the *Second Carey Trust* case (No. 135 on this Court's docket). The activities of petitioner and its trustees in 1933 and 1934 were also similar to those in the *Second Carey Trust* case.

Respondent, the Board, and the lower Court all held that petitioner is an association taxable as a corporation (R. 23, 33–34, 79).

The aforesaid properties were conveyed to petitioner for a consideration of $140,000.00 payable in installments (R. 74–75). The seller retained title to the property until all payments should be made, but petitioner was to acquire an equitable title to a proportionate part of the property as each payment was made. The income from the property was to be credited to petitioner on the seller's books as the oil was produced, but only the part of the income applicable to that portion of the lease for which petitioner had paid could be withdrawn by petitioner (R. 75–76). In addition to receiving the income to which it was entitled in 1933, petitioner received out of the amount entered on the seller's books a contribution to corpus in the amount of $27,579.21 (R. 42, 55–56). Said amount was not income but has not been excluded from income by respondent, the Board, or the lower Court. The issue was before the Board in Par. 4(b) of the petition (R. 8).

Petitioner's trustees filed income tax returns for 1933 and

1934 as a trust on Form 1040 (R. 13, 23). They did not file capital stock tax returns (required of corporations) because they believed petitioner was taxable as a trust and, therefore, not liable for capital stock taxes (R. 25, 32). After the Board's opinion was promulgated, holding petitioner taxable as a corporation, petitioner filed capital stock tax returns for 1933 and 1934 and paid the tax shown due thereon (R. 82–84).

Upon audit of petitioner's income tax returns respondent held that petitioner was an association taxable as a corporation, but he did not compute correctly the income and tax on that basis. He did not allow any exemption for a capital stock value in computing excess profits tax and did not allow the deductions for depreciation and cost depletion taken by petitioner on its returns, although the data to substantiate such deductions was available to him (R. 13–14, 24–25, 34, 69). Respondent did allow a depletion deduction on the percentage basis for 1933 and the Board did so for 1934 (R. 34). The law provides that there shall be allowed as deductions a reasonable amount for depreciation and for depletion and that the depletion deduction shall be upon the cost or percentage basis, whichever gives the greater deduction (App. p. 7).

The further question is whether the case should be remanded to the Board for rehearing to determine the deductions which are allowable to petitioner in the taxable years and the exemption (12½% of the declared capital stock value) to which it is entitled in computing its excess profits taxes for both years; and for further evidence regarding the non-taxability of the contribution to capital as aforesaid. The attorney representing petitioner at the time of the hearing proceeded, as in the *Second Carey Trust* case, upon the theory that the primary question was whether petitioner was taxable as a trust or a corporation; and that, after that question was decided, a further hearing would be held, if necessary, to determine the correct tax liability on the corporate basis. Accordingly, he did not submit at the hearing the evidence necessary to establish the deductions and the exemption from excess profits tax. At the conclusion of the hearing, he moved for a further

hearing to determine the correct tax liability if the Board should hold petitioner taxable as a corporation (R. 26–27). The Board decided the case on the record before it, even though the record was obviously incomplete and did not provide the facts on which to compute the income and tax liability for 1933 and 1934 correctly (R. 32–35). Petitioner filed a timely motion for rehearing, reconsideration, and further hearing, which the Board denied (R. 35–38).

The lower Court affirmed the Board, but held that if petitioner had filed a return and paid a capital stock tax, even though delinquent, the Board should have allowed the exemption or the case should be remanded for that purpose (R. 81). Petitioner then filed the petition for rehearing and modification of opinion and judgment (R. 82–84), in which it showed that the capital stock tax returns had been filed and the taxes due had been paid after the Board's opinion had been rendered, but before the Board's decision and before petition for review to the lower Court was filed. The Court denied the petition for rehearing and modification of opinion and judgment (R. 84).

QUESTIONS PRESENTED.

The questions presented are:

1. Is petitioner a trust and taxable as a trust, or is it an association taxable as a corporation?

2. Even if petitioner is held to be an association taxable as a corporation, should the case be remanded to the Board, when the tax liability as determined is obviously erroneous, for the purpose of determining petitioner's correct income tax and excess-profits tax liability for 1933 and 1934, with particular reference to the allowance of cost depletion, depreciation, and exemption for excess profits tax, and the exclusion from income of the amount contributed to capital in 1933?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

With regard to the question of whether petitioner is taxable as a trust or as a corporation, petitioner relies for allowance of

writ of certiorari upon the first, second, and third reasons for allowance of the writ set out in the petition for writ of certiorari in the case of *Second Carey Trust, et al.*, v. *Helvering, et al.*, No. 135 on this Court's docket.

On the second question of whether the case should be remanded for rehearing, petitioner relies upon the sixth reason for allowance of the petition for writ of certiorari in the *Second Carey Trust* case, and upon the following further reason:

The lower Court's decision conflicts with the decision of the Circuit Court of Appeals, Fifth Circuit, in *Del Mar Addition* v. *Com.*, 113 F. (2d) 410, where it was held that the exemption against excess profits tax provided by law (App. 8) of 12½% of the declared capital stock value is not dependent upon the timely filing of a capital stock tax return. It has been shown that petitioner filed capital stock tax returns for 1933 and 1934 which were not timely, but petitioner's failure to file them earlier was in good faith and because of its belief that it was taxable as a trust and not as an association. After the Board's opinion, and in compliance therewith, petitioner filed the returns and paid the capital stock taxes due thereon (R. 82–84). The Board and the lower Court have both refused petitioner the opportunity to prove these facts, although the Court recognized petitioner's right to an exemption against excess profits tax. The refusal of a rehearing results in manifest injustice under the facts of this case.

CONCLUSION.

For the foregoing reasons, the petition for writ of certiorari should be granted.

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